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No. 96-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRET SCHUNDLER, *in his official capacity as mayor of the City of Jersey City*, THE CITY COUNCIL OF JERSEY CITY, *and* THE CITY OF JERSEY CITY, NEW JERSEY,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *on behalf of its members*, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, *and* ANN SORREL,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

The main thrust of Respondents' brief in opposition is their insistence that this case is nothing more than a factual squabble set against the backdrop of settled law. Hardly. The role of religious elements in public culture is an issue that has deeply divided this Court on each occasion the Court has considered it. That has left the law anything but settled. The courts of appeals are also divided, both over the legal standard to be applied to such cases, and over the results that follow from

such standards. The present case is an excellent vehicle for resolving those divisions.[1]

1. Respondents claim that this is an unremarkable case in which "the Third Circuit was merely following the analytical steps required by *Allegheny*." (Br. Opp. at 4). In fact, the Court of Appeals' opinion departs sharply from *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). This Court in *Allegheny* upheld the display of a religious symbol, a menorah, together with a tree and a sign saluting liberty at the entrance to the City-County building. The Court of Appeals in this case struck down a more broadly and more explicitly diverse display -- a menorah, a creche, a tree, and a sign stating that this display and the "others throughout the year" were all intended to "celebrate the diverse cultural and ethnic heritages" of the citizenry. (App. 69a).

Moreover, the Court of Appeals, contrary to *Allegheny* (and to *Capitol Square Review & Advisory Board v. Pinette*, ___ U.S. ___, 115 S. Ct. 2440 (1995)), seems to have promulgated a per se rule against creches in front of government buildings. According to the Court of Appeals,

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[1]Respondents obliquely suggest that this case should not be given plenary review because the Court of Appeals ordered part of it remanded to the District Court. *See* Br. Opp. at 3. But Respondents fail to note that the main issue involved in this petition, the constitutionality of the original display, was not remanded at all, but simply affirmed. Petition App. at 36a-37a. Moreover, the issue that the Court of Appeals *did* remand, the constitutionality of the modified display, *id.* at 37a, involves only the application of the Court of Appeals' chosen legal standard to stipulated facts. In any event, there is nothing novel about this Court granting plenary review to decisions that include partial remands. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879 (1988).

"Government display of a creche . . . cannot convey a meaning separate from the very act it is meant to portray." (App. 35a); *see also* App. 35a-36a ("We reiterate that Jersey City's display of the creche at the seat of City government power impermissibly conveyed a message of government endorsement of religion."). Such a rigid approach is in stark conflict with *Allegheny*, which requires courts to analyze religious symbols in both their spatial and temporal context.[2]

2. Respondents, however, announce that it was "long ago" settled that "religious displays that are government owned, located on government property that is not a public forum, and situated in front of . . . the seat of local government" are unconstitutional. Petitioners are at a loss as to where or when that was "answered long ago" in Respondents' favor. To repeat, *Allegheny* upheld a menorah displayed by the government in front of its City-County Building. And while it is true that legal title to the menorah lay with Chabad Lubavitch, the Court emphasized that its display was government speech, not private speech. "The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city." 492 U.S. at 587 (footnote omitted). In fact, the government stressed its responsibility for the display with a sign, which read, under the title "Salute to Liberty": "During this holiday season, *the city of Pittsburgh* salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.* at 582 (emphasis added). What the Court

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[2]Respondents' own reading of *Allegheny* is a bit shaky. They state that "[a]fter finding that the tree was 'clearly the predominant element in the city's display' (*id.* at 617), the Court concluded that the overall impact of the display was secular." (Br. Opp. at 5). But their quotation about "predominant element" comes from section VI of Justice Blackmun's opinion, which he wrote for himself alone, and not for the Court.

found crucial was the message that the menorah, in context, conveyed to a reasonable observer, not who held legal title to it.

3. As Respondents concede, the Sixth Circuit has upheld a city-owned and erected creche displayed in front of City Hall. *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990); *see* Br. Opp. at 9. Thus, not only has the question not been "answered long ago," it is currently dividing the Courts of Appeals. Respondents call this dispute "factual in nature." (Br. Opp. at 9). But after having so loudly insisted that the question was foreclosed as a matter of law, it will not do to say that it is merely factual after all.[3]

Respondents nevertheless insist that there are no (other) real conflicts between the Court of Appeals below and other circuits. Respondents are mistaken. As an initial matter, they simply ignore the division among the courts of appeals over whether to follow Justice O'Connor's mode of endorsement analysis, or Justice Stevens'. *See* Pet. at 11-15. Respondents instead content themselves with distinctions that are either unsupported by the opinion in question or are beside the point.

Respondents claim that the Ninth Circuit's holding in *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996), was based on a determination that the statue of an Aztec deity at issue in that case was not religious at all. But that is simply not so. It *is* true that before applying the endorsement test, the Court determined that the statue was not related to New Age or Mormon beliefs, two claims advanced by the plaintiffs. *Id.* at

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[3]*Cf.* Gilbert & Sullivan, "I am the Captain of the Pinafore", *H.M.S. Pinafore* (1878) ("What, never? No, never! What, never? Well, hardly ever.").

1231. However, as to a third claim, that the statue resembled the religious symbols of the Zapatista rebels in Mexico, the Ninth Circuit found it necessary to apply the endorsement test. Analyzing the statue from the viewpoint of a reasonable observer, whom the court held must be "informed as well as reasonable," *id.* at 1232, the court determined that "[t]he reasonable observer is not an expert on esoteric religions" and "cannot be expected to infer an endorsement of the religion practiced by a revolutionary group in southern Mexico." *Id.* Respondents' claim that the Ninth Circuit's use of Justice O'Connor's endorsement test does not conflict with the test preferred by the Court below is thus mistaken.

Also mistaken is Respondents' characterization of *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996). Respondents think that *Gaylor* upheld the motto "In God We Trust" only because of its "peculiar historical and ceremonial usage." (Br. Opp. at 9.) But the court did not limit its analysis to historical usage. The court engaged in the holistic endorsement inquiry developed by Justice O'Connor and adopted by most other circuits (though rejected by the court below): "[W]e find that a reasonable observer, aware of the purpose, context, and history of the phrase 'In God we trust,' would not consider its use or its reproduction on U.S. currency to be an endorsement of religion." *Id.* at 217.

Next, Respondents say that the remaining courts of appeals' decisions adopting Justice O'Connor's approach involved private speech, not government speech. That is irrelevant. Whether endorsement analysis applies to private speech in a public forum was, of course, another topic of lively debate in *Pinette*. 115 S. Ct. at 2447-50; *id.* at 2452-55 (O'Connor, J., concurring), 2465-69 (Stevens, J., dissenting).

Suffice it to say that both Justice O'Connor's concurrence (joined by Justice Souter and Justice Breyer) and Justice Stevens' dissent decided that it does. It is not surprising that the courts of appeals that are lining up behind either the *Pinette* concurrence or the dissent agree with them. The question here, however, is not *when* endorsement analysis applies, but *how* it applies. Respondents' purported distinction thus actually argues in favor of granting plenary review. The fact that the courts of appeals are applying endorsement analysis not just to government speech cases, but to other types of Establishment Clause claims as well, shows only how urgent it is that the split among the circuits be resolved.

4. Respondents are greatly mistaken when they say that this case presents no undecided issue of law. (Br. Opp. at 6.) This Court has twice wrestled with the question of religious elements in government cultural displays without fully eliminating the confusion of the lower courts -- to say nothing of the annual confusion of mayors and city councils across the country. The courts of appeals' divergence between Justice O'Connor's and Justice Stevens' analyses only deepens the problem.

The present case provides a solution. The undisputed facts show that the creche, menorah, tree and sign at issue are only a small part of a year-round cultural program. Other activities range from the Hindu Grand Phagwah Parade to various ethnic festivals to a broad assortment of flag raisings. And contrary to Respondents' statement in their opposition, (Br. Opp. at 1), the record *does* indicate that some of these involved unattended displays, both inside and in front of City Hall. In fact, Respondents stipulated to that fact. Stipulation of Parties ¶¶ 21-23, App. 70-73a. More to the point, all of the

City's cultural efforts, whether displays, parades, or festivals, are accompanied by the same sign, which ties them all together: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its people." *Id.* ¶ 14, App. 69a, 76a.

Unlike either *Allegheny* or *Lynch v. Donnelly*, 465 U.S. 668 (1984), therefore, this case puts cultural religious symbols in their full context. Both the spatial context and the temporal context of Jersey City's cultural program show it to be just that -- a cultural program. Justice O'Connor's reasonable observer would know that. He or she would be aware that religious elements are natural in cultural activities. And because Jersey City's various cultural efforts do no more than mirror the various cultures of its residents, he or she would be unperturbed.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in our Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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